Supreme Court, U. S.
FILED
AUG 18 1976
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM—1976

No. 76-240

JOHN RYDER,

Petitioner,

vs.

DALLAS & MAVIS FORWARDING COMPANY, INC.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

DANIEL T. HANLEY,
Counsel for Petitioner,
29 Howe Avenue,
Passaic, New Jersey 07055.
(201) 471-0766

Adams Press Corp., 11 Commerce Street, Newark, N. J. 07102—(201) 623-8611

TABLE OF CONTENTS

	PAGE
OPINIONS BELOW	1
JURISDICTION	2
QUESTIONS PRESENTED	2
CONSTITUTIONAL PROVISIONS INVOLVED	2
Fourteenth Amendment to the United States Constitution	2
STATEMENT OF THE CASE	2
REASONS FOR GRANTING THE WRIT	3
A. The procedure in the trial court contained an inherent denial of due process	3
B. The Court of Appeals for the Third Circuit should have considered the appeal from the District Court on the merits	5
CONCLUSION	6
APPENDIX:	
Judgment of the United States Court of Appeals for the Third Circuit	1a

Case Cited

Greenwood v. Greenwood, 224 F. 2d 318 (3 Cir. 1955)	6

United States Constitution Cited

Fourteenth Amendment	2, 6
Sec. 1	2

PAGE

Statute Cited

28 U.S.C.:

Sec. 1254(1) 2

IN THE

Supreme Court of the United States

OCTOBER TERM—1976

No.

JOHN RYDER,

Petitioner,

vs.

DALLAS & MAVIS FORWARDING COMPANY, INC.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioner John Ryder respectfully prays that a writ of certiorari issue to review the judgment of the Circuit Court of Appeals for the Third Circuit entered in the above entitled case on June 23, 1976.

Opinions Below

No opinion was rendered by the Court of Appeals. The Judgment Order of the Court issued in lieu of mandate is reproduced as Appendix "A".

Jurisdiction

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1). The procedure followed below is challenged as a denial of due process contrary to the Fourteenth Amendment.

Questions Presented

1. Whether the procedure followed in the trial courts respecting the instruction to a jury on the doctrine of "res ipsa loquitur" denies petitioner due process.

Constitutional Provisions Involved

Fourteenth Amendment to the United States Constitution

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Statement of the Case

This is an action for personal injuries based on negligence.

Petitioner was a self-employed trucker. He took his tractor to a Diesel service station. While he was in the

cab of the tractor on the service station property, a flatbed trailer operated by defendant and carrying a large, steel submarine component, passed. The component flew off the trailer, struck the cab and petitioner was seriously injured.

At trial in the District Court petitoner relied heavily on the doctrine of "res ipsa loquitur" and the Court gave the jury the customary charge. The jury returned a verdict of no cause.

Petitioner moved for a new trial. While awaiting a hearing on the motion, the time for appealing from the jury verdict expired. The motion was denied and the denial was appealed to the Third Circuit. That Court held that the denial of the motion was not appealable.

Reasons for Granting the Writ

A. The procedure in the trial court contained an inherent denial of due process.

At trial, the judge, at the request of petitioner's counsel, instructed the jury on the doctrine of "res ipsa loquitur". The instruction was given as it customarily is. It was read matter of factly, without explanation and as part of the overall charge. After such an instruction the jury is required to apply the doctrine to the case it is considering. A plaintiff's right to due process depends on the jury's ability both to understand the doctrine completely and apply it accurately. If the jury does not understand the instruction with the thoroughness required to apply it properly, a plaintiff is denied due process.

To what extent, then, may a jury justifiably be presumed to have comprehended an instruction on "res ipsa loquitur"? No law, either statutory or decisional, may prop-

erly be invoked for a factual answer to the question. There may, indeed, be decisions that declare that a jury is "presumed" to comprehend. The presumption, however, is based on fiat rather than fact.

The ability of a jury to understand an instruction on "res ipsa loquitur" must be determined with reference to the ability of the human mind to absorb any information that is given to it in as cursory a fashion as the instruction. The universal human experience testifies convincingly that the ability is limited indeed.

Some homely examples outside the field of law might be illuminating. 1. A driver asks directions to a point in a city with which he is unfamiliar. He must make four turns at intersections he has not before seen. He makes no jotting of the directions. (A jury may make no notes.) Quaere: Judging by human experience, will the driver, one half hour later, recall the directions without error and follow them accurately? 2. In the course of a conversation one person gives another a telephone number to call one half hour later. It is not jotted down. (A jury may not make notes.) Quaere: How justifiable is the presumption that the number will be called accurately?

The universal experience teaches that the human mind absorbs knowledge by repetition and reflection—study. The extent of the study required depends on the complexity of the instruction and the mental agility of the student. And the human experience also teaches that human memory is woefully unreliable.

Insofar as the examples given above are concerned, the likelihood of the driver following the directions is reasonably good. But there is no justification for assuming that he will undoubtedly do so. And what reasonable person would guarantee that the phone number will be

called without error? Too, the examples involve only memory—not complexity of subject matter.

The human experience demonstrates that the average man is not vested with the faculties or comprehension and recall required to secure his assured performance of the tasks set out in the examples above. By what logic, then, do we vest him with such faculties when he serves on a jury? Our trial procedure transmutes the juryman into a being possessed of abilities not possessed by the ordinary man. The human experience demonstrates that the transmutation does not take place.

A litigant who depends to any degree upon the doctrine of "res ipsa loquitur" is required to depend for a fair trial upon a presumption as to the capacity of a jury which is false. The presumption is false as a matter of human experience. What is false as a matter of human experience is false with finality and no legislative or judicial benediction can improve it.

Petitioner herein was denied due process.

B. The Court of Appeals for the Third Circuit should have considered the appeal from the District Court on the merits.

Petitioner appealed to the Third Circuit from the denial of his motion in the District Court for a new trial. The Circuit Court held that the appeal should have been from the jury verdict and that the denial of the motion was not appealable. The motion in the District Court and the appeal in the Circuit Court were both based on petitioner's contention that a jury's inability to comprehend the doctrine of "res ipsa loquitur" denied him a fair trial.

This case was an appropriate one for the exercise by the Court of Appeals of the power referred to by Judge Hastie in *Greenwood* v. *Greenwood,* 3 Cir., 1955, 224 F 2nd 318, 319.

> It is true that where there has been a final judgment and an appeal from the denial of a motion for a new trial appears to be an inartificial attempt to obtain review of that judgment, a Court of Appeals may, under exceptional circumstances, act upon such an appeal as if it were taken from the judgment. *E.g. Atlantic Coast Line R. Co.* v. *Mims,* 5 Cir., 1952, 199 F 2d 582; *Sun Lite Awning Corp.* v. *E. J. Conklin Aviation Corp.,* 4 Cir., 1949, 76 F 2d 344.

CONCLUSION

For the reasons set forth above, petitioner was denied his Fourteenth Amendment right of due process. This Court is therefore requested to grant this Petition for Writ of Certiorari.

Respectfully submitted,

DANIEL T. HANLEY
Counsel for Petitioner

APPENDIX

Judgment of the United States Court of Appeals for the Third Circuit

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 75-2357

JOHN RYDER,

Appellant,

vs.

DALLAS AND MAVIS FORWARDING CO., INC.,
a corporation of Indiana.

Appeal from the United States District Court
for the District of New Jersey

CIVIL ACTION No. 74-398

Submitted under Third Circuit Rule 12(6)

May 24, 1976

Before: MARIS, ADAMS and HUNTER, *Circuit Judges.*

Judgment of the United States Court of Appeals for the Third Circuit

JUDGMENT ORDER

After consideration of all contentions raised by the appellant and finding that the district court's denial of a motion for a new trial is not appealable under 28 U.S.C. §§ 1291 and 1292(a), *see* Fairmont Glass Works v. Cub Fork Coal Co., 287 U.S. 474, 481-83 (1933) and Greenwood v. Greenwood, 224 F.2d 318, 319 (3d Cir. 1955), it is

ADJUDGED AND ORDERED that the appeal be and is hereby dismissed.

Each party to bear its own costs.

BY THE COURT,

ARLIN M. ADAMS
Circuit Judge

ATTEST:

THOMAS F. QUINN
Clerk

Dated: Jun 1 1976

Certified as a true copy and issued in lieu of a formal mandate on June 23, 1976.

Test:

THOMAS F. QUINN
Clerk, United States Court of Appeals
for the Third Circuit